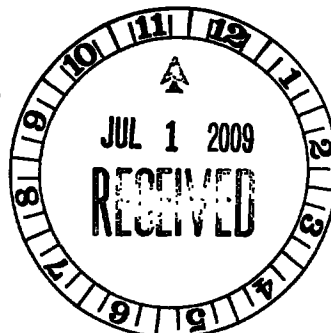


THOMPSON COBURN

225319

Thompson Coburn LLP
Attorneys at Law

Suite 600
1909 K Street, N.W.
Washington, D C. 20006-1167
202-585-6900
FAX 202-585-6969
www.thompsoncoburn.com



July 1, 2009

Warren L. Dean, Jr.
direct dial 202-585-6908
direct fax 202-585-6969
wdean@thompsoncoburn.com

VIA HAND DELIVERY

ENTERED
Office of Proceedings

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Public Record

The Honorable Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 34943
Beaufort Railroad Company, Inc.'s - Modified Rail Certificate

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced docket please find one (1) original and ten (10) copies of a Reply in Opposition to Petition for Stay Filed by Diane D. Terni, Greedy Children Land, LLC and Prodigal Son, LLC.

Kindly date stamp the additional copy of this letter and Reply and return the same to our courier.

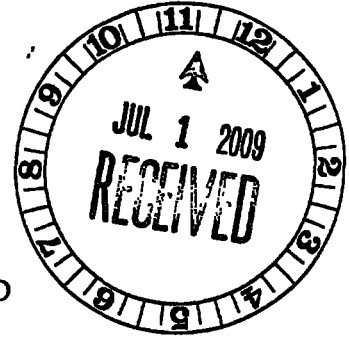
If you have any questions regarding the enclosed, please contact me at the telephone number listed above.

Very truly yours,

Thompson Coburn LLP


Warren L. Dean, Jr.

Enclosures



BEFORE THE
SURFACE TRANSPORTATION BOARD

Beaufort Railroad Company, Inc., a subsidiary of
the South Carolina Division of Public Railways –
Modified Rail Certificate

Finance Docket: 34943

**REPLY IN OPPOSITION TO PETITION FOR STAY
FILED BY DIANE D. TERNI, GREEDY CHILDREN LAND, LLC
AND PRODIGAL SON, LLC**

Derek F. Dean
Simons & Dean
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412
Tel.: 843-762-9132
Fax: 843-406-9913

Counsel for Beaufort
Railroad Company, Inc., a
subsidiary of the South
Carolina Division of Public
Railways

Warren L. Dean, Jr.
Sean McGowan
Kathleen E. Kraft
Thompson Coburn, LLP
1909 K Street, N.W.
Suite 600
Washington, D.C.
20006

Counsel for the South
Carolina State Ports
Authority

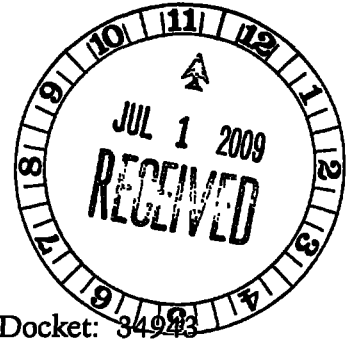
Raymond H. Williams
P.O. Box 1027
Beaufort, SC 29901-1027

Counsel for the Beaufort-
Jasper Water and Sewer
Authority

Dated: July 1, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

Beaufort Railroad Company, Inc., a subsidiary of
the South Carolina Division of Public Railways –
Modified Rail Certificate



Finance Docket: 34923

**REPLY IN OPPOSITION TO PETITION FOR STAY
FILED BY DIANE D. TERNI, GREEDY CHILDREN LAND, LLC
AND PRODIGAL SON, LLC**

Beaufort Railroad Company, Inc. ("BRC"), the South Carolina State Ports Authority ("SCSPA") and the Beaufort-Jasper Water and Sewer Authority ("BJWSA" and collectively with BRC and SCSPA, the "South Carolina Parties") submit their Reply in Opposition (the "Reply") to the Petition for Stay ("Petition") filed by Diane D. Terni ("Terni"), Greedy Children Land, LLC ("Greedy Children"), and Prodigal Son, LLC ("Prodigal Son" and together with Terni and Greedy Children, the "Petitioners"). In support of their Reply, the South Carolina Parties state the following:

Background

On March 19, 2008, the Surface Transportation Board (the "Board") issued its decision denying all petitions for reconsideration and a request for investigation of a December 2006 notice of filing of a modified certificate of public convenience and necessity under 49 C.F.R. §§ 1150.21-23 (the "Notice of Modified Certificate") for operation of the Port Royal Railroad Line (the "Line") in South Carolina (the "March 2008 Decision"). The Board found that the Line had not been abandoned, that the Line remained a part of the interstate rail system, and that the Board retained jurisdiction to authorize BRC's operation pursuant to the modified certificate. See March 2008 Decision at 1. The Board also sanctioned possible interim trail use for the Line in the event that BRC (the operator on the Line) terminated its service

obligations, so long as SCSPA (the owner of the Line) found an interested party to use the Line in a manner consistent with the statutory and regulatory requirements of the National Trails System Act (the "Trails Act"). *See* March 2008 Decision at 9. In April 2008, Clarendon Farms, LLC, Diane D. Terni, Greedy Children Land, LLC, Prodigal Son, LLC, Mr. and Mrs. William M. Mixon, Dekock SA, Trustee of the JC and AJ Harden Irrevocable Trust, and Ray Basso (collectively, the "Landowners") filed a petition for reconsideration of the Board's March 2008 Decision.

The South Carolina Parties determined that current need for service over the Line was unlikely and also found an interested party to use the Line for interim trail use. Therefore, on July 16, 2008, the South Carolina Parties filed a Notice of Intent to Terminate Service and Request for Issuance of Notice of Interim Trail Use/Rail Banking (the "Notice & Request"). In the Notice & Request, the South Carolina Parties sought termination of service over the Line and a concurrent issuance of a Notice of Interim Trail Use ("NITU") to rail bank the Line, pursuant to the Trails Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29.

On May 20, 2009, the Board issued its decision denying the Landowners' petition for reconsideration of the March 2008 Decision and granting the South Carolina Parties' request for a NITU (the "May 2009 Decision"). The Board found that there was no material error in its March 2008 Decision. *See* May 2009 Decision at 1.

On June 19, 2009, one of the Landowners, Clarendon Farms, LLC, filed a Petition for Stay of the Board's May 2009 Decision pending judicial review (the "Clarendon Petition for Stay"). The instant Petition sets forth exactly the same deficient arguments for granting the requested stay as did the Clarendon Petition for Stay. Except for minor changes to reflect the existence of multiple petitioners, the Petition is identical to the Clarendon Petition for Stay.

The South Carolina Parties replied to the Clarendon Petition for Stay on June 24, 2009 (the "Reply to Clarendon's Petition").

On June 30, 2009, Petitioners filed the Petition with the Board. Given the similarity between the Petition and the Clarendon Petition for Stay, the South Carolina Parties now reiterate their arguments from their Reply to Clarendon's Petition and set forth the following additional arguments in opposition to the requested stay.

Argument

The Petition represents yet another attempt by Petitioners to challenge the South Carolina Parties' rights regarding the Line and demonstrates Petitioners' stubborn refusal to accept the Board's well-reasoned decisions in this case. Petitioners fail to present any arguments that support the granting of a stay of the Board's May 2009 Decision. For the following reasons, the Board should reject Petitioners' arguments and deny Petitioners' request for a stay of the May 2009 Decision pending judicial review.

Petitioner Fails To Establish The Elements Necessary To Justify The Issuance Of A Stay In This Case

To justify the issuance of a stay of the May 2009 Decision, Petitioners must establish that: "(1) [they] will suffer irreparable harm in the absence of a stay; (2) there is a strong likelihood that [they] will prevail on the merits; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports granting the stay." *Canadian Nat'l Ry. Co. v. Grand Trunk Corp.-Control-Eje West Co.*, STB Finance Docket No. 35087, at 4 (Jan. 16, 2009) ("*Canadian Nat'l Ry. Co.*") (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921,

925 (D.C. Cir. 1958)). Petitioners have the high burden of persuasion on all of the elements required for the issuance of such extraordinary relief. *Canadian Nat'l Ry. Co.*, STB Finance Docket No. 35087, at 4 (Jan. 16, 2009) (citing *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)).

Petitioners cannot justify the issuance of a stay in this case because Petitioners cannot establish that (1) they are substantially likely to succeed on the merits of their appeal, (2) they will suffer irreparable harm absent a stay, (3) a stay will not harm the interests of the South Carolina Parties, and (4) a stay of the Board's May 2009 Decision is in the public interest. Therefore, Petitioners' request for issuance of a stay in this case should be denied.

A. Petitioners Fail To Show That There Is A Substantial Likelihood That They Will Prevail On The Merits Of Their Challenge To The Board's Refusal To Reconsider The December 28, 2006 Issuance Of The Notice Of Modified Certificate.

Petitioners will not succeed on the merits of their claims on appeal. Twice now, and despite all of Petitioners' attempts to the contrary, this Board has reviewed Petitioners' contentions and has delivered reasoned decisions refusing to reconsider its issuance of the Notice of Modified Certificate. In both the March 2008 Decision and the May 2009 Decision, the Board engaged in "reasoned decisionmaking" and its decisions are explained and supported by the extensive record in this case.

Petitioners' arguments in support of their likelihood of success mirror Petitioners' previous arguments in previous petitions for reconsideration presented to the Board, and Petitioners fail to offer any additional information in support of their claims. The Board has already considered and rejected Petitioners' arguments in its prior decisions, and nothing in the Petition suggests that an appellate court would view the circumstances differently than the

Board.¹ The Petition is merely Petitioners' attempt at a third "bite at the apple," and Petitioners should not be able to use the stay provision in 49 C.F.R. § 1115.5 to accomplish their objectives. *See Tri-State Brick & Stone of New York, Inc. & Tri-State Transp., Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34824, at 3 (Feb. 12, 2008).

B. Petitioners Will Not Be Irreparably Harmed Absent A Stay.

The issuance of a stay is an "extraordinary remedy and should not be granted unless the requesting party can show that it faces irreparable injury that is 'both certain and great,' 'actual and not theoretical,' and 'will directly result from the action' that would be enjoined." *Canadian Nat'l Ry. Co.*, STB Finance Docket No. 35087, at 2 (Jan. 16, 2009) (citing *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Petitioners fail to show that they will suffer the kind of irreparable harm that the extraordinary remedy of a stay seeks to prevent. Petitioners have presented no evidence that Petitioners acquired their adjacent property with any expectation of future rights to the corridor on which the right-of-way lies.² Far from being a question of irreparable harm, this is, in reality, a question of Petitioners' seeking an unanticipated, and highly speculative, potential

¹ The appellate courts review the Board's decisions under the "highly deferential arbitrary-and-capricious standard" of the Administrative Procedures Act. *See, e.g., City of South Bend, IN v. Surface Transp. Bd.*, -- F.3d --, 2009 WL 1492555, at *2 (D.C. Cir. May 29, 2009) (internal citations omitted); *North American Freight Car Ass'n v. Surface Transp. Bd.*, 529 F.3d 1166, 1170-71 (D.C. Cir. 2008); *see also New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1181 (D.C. Cir. 2004) (stating that the court will uphold an STB decision so long as the STB "engaged in reasoned decisionmaking" and "its decision is 'adequately explained and supported by the record.'"). Petitioners' argument that they are likely to succeed on the merits of this case supposes, without any basis whatsoever, that the appellate court would not take into account the fact that Petitioners have twice tried, unsuccessfully, to reverse the Board's issuance of the Notice of Modified Certificate.

² Upon information and belief, Terni holds ownership interests in several parcels of property in South Carolina, including but not limited to a parcel of property known as Brewton Plantation. *See generally* http://rodweb.bcgov.net/nvtest/or_sch_1.asp (last visited June 25, 2009). Over the years, Terni has conveyed portions of her holdings to Greedy Children and Prodigal Son, and Terni serves in an executive capacity and as the registered agent for Greedy Children and Prodigal Son.

windfall.³ Moreover, Petitioners describe their alleged irreparable harm only in general, conclusory terms. Petitioners' allegations fall short of demonstrating a particularized irreparable injury that would warrant the imposition of a stay. *See San Jacinto Rail Limited Construction Exemption & Burlington N. & Santa Fe Ry. Co. Operation Exemption—Build-Out to the Bayport Loop Near Houston, Harris County, TX*, STB Finance Docket No. 34079, at 11 (July 9, 2003).

Petitioners first argue that absent a stay, the South Carolina Parties will sell the Line to BJWSA and begin installation of water and sewer pipes. To do so, Petitioners allege that the South Carolina Parties will enter Petitioners' property and undertake substantial construction that Petitioners will be hard-pressed to undo down the road. Petitioners also allege that the supposed actions of the South Carolina Parties will destroy Petitioners' adjoining property, described by Petitioners as "pristine, beautiful land that is largely undeveloped and natural." *See* Petition at 7. Petitioners' allegations of harm resulting from the South Carolina Parties' possible activities on the right-of-way do not meet the stringent standard of "actual and imminent" harm necessary to justify granting a stay in this case. Rather, Petitioners allege harm that is speculative, remote and theoretical; such harm is insufficient to support a stay of the Board's May 2009 Decision. The South Carolina Parties, and BJWSA in particular, have no plans to undertake any construction activities on the Line that would affect Petitioners' adjoining land. Even if the South Carolina Parties intended to work along the Line, such work would be confined to the Line, would be no more intrusive than maintaining the rail lines

³ Petitioners imply that they own the property on which the right-of-way runs; however, the Board conclusively determined that the SCSA had not abandoned the Line under federal law, *see* March 2008 Decision at 7, and there has been no credible suggestion that the adjacent property owners have cognizable rights to the right-of-way corridor itself.

along the Line, and would have no conceivable effect upon the asserted "undeveloped and natural" state of Petitioners' property.

Also, Petitioners argue that conversion of the Line into recreational trail use will create a public expectation of access to and use of the Line that will be difficult to reverse after Petitioners win their appeal. However, Petitioners ignore the fact that SCSPA, as the owner of the Line, is entitled to preserve it as a rail line either by maintaining the Line as a railroad line for potential service to shippers under the modified rail certificate or by preserving the Line for future rail service by "rail banking" the Line pursuant to the Trails Act. SCSPA has determined that the best use of the Line, at the present time, is to rail bank the Line, and SCSPA is entirely within its rights under federal statutory law and the Board's regulations and as owner of the Line to bank the Line and preserve it for future railroad use.

C. Issuance Of A Stay Will Harm The Interests Of The South Carolina Parties.

The issuance of a stay in this case will harm the interests of the South Carolina Parties. The South Carolina Parties have waited patiently for the conclusion of these proceedings and believe that the time has come to afford the Board's decisions in this case the finality that they deserve. Furthermore, the South Carolina Parties assert that an indefinite delay in this case, as will occur if the requested stay is granted, will prejudice the South Carolina Parties' interests.

D. Issuance Of A Stay Is Not In The Public Interest.

The issuance of a stay in the case does not further the public interest. This case and Petitioners' challenges to the Board's issuance of the Notice of Modified Certificate have been pending, in one form or another, since December 2006. Since that time, Petitioners have filed, or joined in, two petitions for reconsideration and the Board has issued two well-reasoned decisions on the issues presented by Petitioners. Petitioners have exhausted the resources of

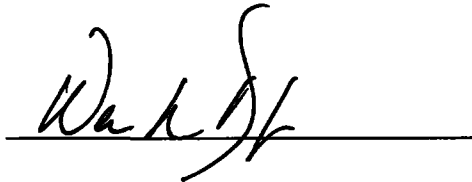
the Board on several occasions now. The issuance of a stay at this point merely delays the inevitable.

Furthermore, the issuance of a stay in this case unreasonably threatens the public interest in preserving rail lines for future use under the procedures outlined in the Trails Act. In enacting the Trails Act, Congress codified its determination that the public interest is advanced by the preservation of public access to, and enjoyment and appreciation of, outdoor areas such as those established along preserved rights-of-way, and furthers its national policy to "preserve established rights-of-way for future reactivation of rail service." *See* 16 U.S.C. §§ 1242 & 1247. And this Board has consistently recognized, and in fact has recognized in this case, that the interim trail use procedures advance "the congressional policy 'of placing the states at the forefront of the federal effort to preserve local rail service.'" March 2008 Decision at 5 (internal footnote omitted). This public interest outweighs any perceived harm to Petitioners and supports a denial of a stay.

Conclusion

For the above stated reasons, the South Carolina Parties request that the Board deny Petitioners' request for the issuance of a stay of the Board's May 2009 Decision pending judicial review.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Warren L. Dean, Jr.', is written over a horizontal line.

Derek F. Dean
Law Offices of
Simons & Keaveny
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412
Tel.: 843-762-9132
Fax : 843-406-9913

Counsel for Beaufort
Railroad Company, Inc., a
subsidiary of the South
Carolina Division of Public
Railways

Warren L. Dean, Jr.
Sean McGowan
Kathleen E. Kraft
Thompson Coburn, LLP
1909 K Street, N.W.
Suite 600
Washington, D.C.
20006

Counsel for the South
Carolina State Ports
Authority

Raymond H. Williams
P.O. Box 1027
Beaufort, SC 29901-1027

Counsel for the Beaufort-
Jasper Water and Sewer
Authority

Certificate of Service

I hereby certify that on July 1, 2009, I served the foregoing Reply in Opposition to Petition for Stay Filed By Diane D. Terni, Greedy Children Land, LLC and Prodigal Son, LLC on the following individuals by U.S. First Class Mail:

The Honorable Mark Sanford
Office of the Governor
P.O. Box 12267
Columbia, SC 29211
(via First Class Mail)

Elizabeth S. Mabry
South Carolina Department of Transportation
955 Park Street
P.O. Box 191
Columbia, SC 29202-091
(via First Class Mail)

Joe E. Taylor, Jr.
Secretary of Commerce
South Carolina Department of Commerce
1201 Main Street
Suite 1600
P.O. Box 927
Columbia, SC 29201-3200
Tel: 803-737-6400
Fax: 803-737-0418
(via First Class Mail)

Jeffrey McWhorter
South Carolina Division of Public Railways
540 East Bay Street
Charleston, SC 29403
Tel: 843-727-2067
Fax: 843-727-2005
(via First Class Mail)

Joseph Melchers
Chief Counsel
South Carolina Public Service Commission
101 Executive Center Drive
Suite 100
Columbia, SC 29210
Tel: 803-896-5100
(via First Class Mail)

Peter D. Coffman
Dow Lohnes LLC
Six Concourse Parkway
Suite 1800
Atlanta, GA 30328
Tel: 770-901-8800
Fax: 770-901-8874
(via First Class Mail)

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street – Suite 1890
Chicago, IL 60604-1112
Tel: 312-236-0204
Fax: 312-201-9695
(via First Class Mail)

Lynn M. Deavers
Dow Lohnes PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036
Tel: 202-776-2000
Fax: 202-776-2222
(via First Class Mail)

John L. Richardson
John L. Richardson, P.L.L.C.
555 13th Street, N.W.
Suite 420 West
Washington, DC 20004
Tel: 202-371-2258
Fax: 202-828-0158
(via First Class Mail)

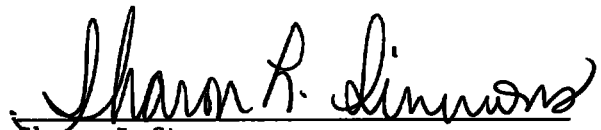
John L. Richardson
2700 Calvert Street, NW
Washington, DC 20008
(via First Class Mail)

Edward R. Hamberger, President
Association of American Railroads
50 F Street, N.W.
Washington, DC 20001-1564
(via First Class Mail)

Scott Y. Barnes
Warren & Sinkler, L.L.P.
171 Church Street
Suite 340
Charleston, SC 29402
Tel: 843-577-0660
Fax: 845-577-6843
(via First Class Mail)

G. Dana Sinkler
Warren & Sinkler, LLP
P.O. Box 1254
Charleston, SC 29402
(via First Class Mail)

Richard F. Timmons, President & Treasurer
American Short Line and Regional Railroad
Association
50 F Street, N.W.
Suite 7020
Washington, DC 20001
Fax: 202-628-6430
(via First Class Mail)


Sharon L. Simmons